

DIVISION I
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evidentiary hearing requested

No. 2004-D-3113

PERRY AVRAM MARCH

Comes now the accused, by and through counsel, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8 and 9 of the Constitution of the State of Tennessee, Rules 12(b) and 47 of the Tennessee Rules of Criminal Procedure, and Rule 408 of the Tennessee Rules of Evidence, and moves to exclude from evidence any and all statements which are alleged to have been made by the accused during conversations with police on August 12, 2005 during the transport of the accused to Nashville from Los Angeles.

For cause the accused would show as follows:

- 1) The formal institution of charges in this case occurred on December 8, 2004 with the finding of a sealed indictment by the grand jury for Davidson County, Tennessee.

- 2) The Defendant was arrested in this case on August 3, 2005 in the Mexican State of Jalisco. He was transported from there to Los Angeles, California, where he waived an extradition hearing. He remained jailed in Los Angeles until he was brought to Nashville on August 12, 2005.
- 3) At all times since the accused's arrest he has remained in custody, being unable to post bail.
- 4) On August 12, 2005 the accused was flown from Los Angeles to Nashville, accompanied by Sergeant Pat Postiglione and Detective Bill Pridemore of the Metropolitan Nashville Police Department.
- 5) While still at the airport in Los Angeles the accused informed his police escorts that he was represented by legal counsel—Brett Fausett in Los Angeles and John Herbison in Nashville—and he expressly told police that he did not wish to answer questions or be interviewed without counsel present.
- 6) Police declined or failed to give the standard warnings to the accused which are required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny. The accused never waived the procedural safeguards imposed by *Miranda*.
- 7) Notwithstanding the absence of *Miranda* warnings and the assertion by the Defendant of his right to counsel, police questioned or engaged Mr. March in the

functional equivalent of interrogation.¹

- 8) Counsel expect the proof to show that the discussion that the accused had with police was in the context of Mr. March's attempt to ascertain what non-trial disposition of the charges against him might be possible. To this extent, Rule 408 of the Tennessee Rules of Evidence, which excludes evidence of attempting to compromise or offering to accept a compromise a criminal charge or its punishment is inadmissible, requires exclusion.

THE FOREGOING PREMISES CONSIDERED, the Defendant respectfully moves to exclude from evidence any and all statements which are alleged to have been made by him during conversations with police on August 12, 2005 during the transport of the accused to Nashville from Los Angeles. The Defendant requests an evidentiary hearing on this motion.

¹As the Supreme Court of Tennessee has observed in *State v. Sawyers*, 156 S.W.3d 531, 534 (Tenn. 2005):

Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." [*Rhode Island v. Innis*, 446 U.S. [291,] 301[, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).] Interrogation also includes any "practice that the police should know is likely to evoke an incriminating response from a suspect." *Id.* The definition of interrogation focuses primarily upon the accused's perception rather than on the police officer's intent. *Id.* at 301. However, the officer's intent may be relevant to determine whether the officer should have known his or her words or actions were reasonably likely to invoke an incriminating response. *Id.* at 301 n.7.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 16th day of February, 2006.


JOHN E. HERBISON